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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 248

GEORGE K. ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA, PETITIONER

v.

GEORGE FLEUTI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (R. 91–100) is reported at 302 F. 2d 652. The opinion of the district court (R. 19–21) is not reported. The opinion and order of the Board of Immigration Appeals appear at R. 86–90. The opinion, findings of fact, conclusions of law, and order of the special inquiry officer of the Immigration and Naturalization Service appear at R. 79–86.

JURISDICTION.

The judgment of the court of appeals was entered on April 17, 1962 (R. 101). The petition for a writ of certiorari was filed on July 13, 1962, and was

granted on October 15, 1962 (R. 102). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Respondent was ordered deported on the ground that he was excludable by law at the time of his entry as "afflicted with psychopathic personality" because he was a homosexual. The finding that he was a homosexual was based in part upon evidence of his conduct within the United States. The question presented is whether, in these circumstances, the deportation order was constitutionally infirm because of the vagueness of the term "afflicted with psychopathic personality", even though it is clear from the legislative history that Congress intended the statutory term to cover homosexuals.

STATUTES INVOLVED

Section 212(a)(4) of the Immigration and Nationality Act, 66 Stat. 182, 8 U.S.C. 1182(a)(4), provides in pertinent part:

> SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * * *
>
> (4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect;
>
> * * * * * *

Section 241(a)(1) of the same Act, 66 Stat. 204, 8 U.S.C. 1251(a)(1), provides in pertinent part:

> SEC. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the

order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

STATEMENT

On September 22, 1959, following a series of hearings before a special inquiry officer of the Immigration and Naturalization Service (R. 30–79), respondent was ordered deported from the United States under Sections 212(a)(4) and 241(a)(1) of the Immigration and Nationality Act (*supra*) as an alien who, at the time of entry, was within a class of aliens excludable under then existing law, *viz.*, "[a]liens afflicted with psychopathic personality" (R. 79–86). The basis of the finding that he was so afflicted was the fact—undisputed and acknowledged—that he then was, and had been for many years, a homosexual (R. 83–84). An appeal by respondent to the Board of Immigration Appeals was dismissed on November 20, 1959 (R. 86–90), and on January 4, 1961, in an action brought by respondent in the United States District Court for the Southern District of California for declaratory and injunctive relief (R. 3–6), a motion by the government for summary judgment was granted (R. 19–21). On April 17, 1962, the Court of Appeals for the Ninth Circuit set aside the deportation order and enjoined its enforcement on the ground that the term "afflicted with psychopathic personality", as used in Section 212 (a)(4) and applied in this case, is void for vagueness.

The pertinent facts are not in dispute and may be summarized as follows:

A. THE PROCEEDINGS BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

1. Respondent is a 50-year-old alien, a native and citizen of Switzerland (R. 4, 14, 74). He is unmarried and has no children or dependents (R. 74, 84). He was admitted to the United States for permanent residence on October 9, 1952, and has been here continuously since that time, except for a visit of a few hours to Ensenada, Mexico, in August 1956, following which he was readmitted to the United States at San Ysidro, California, as a returning resident (R. 14, 20).

On April 7, 1959, the Immigration and Naturalization Service issued an order requiring respondent to show cause why he was not deportable under Section 241(a)(1) of the Immigration and Nationality Act (*supra*) as an alien who, at the time of his August 1956 reentry,[1] was excludable on the ground that he had been convicted of a crime involving moral turpitude (and hence was inadmissible under Section 212(a)(9) of the Act, 8 U.S.C. 1182(a)(9)) (R. 42). The offense on which the charge of excludability was based (which was not the charge on which the ultimate order of deportation was based; see *infra*, pp. 5–6, 9, incl. n. 2) was the commission of a homosexual act on February 16, 1956, in violation of Section 288a of the

[1] This reentry constituted an "entry" into the United States within the meaning of the immigration laws. Immigration and Nationality Act, § 101(a)(13), 66 Stat. 167, 8 U.S.C. 1101(a)(13). See *infra*, pp. 16–18.

California Penal Code, for which respondent was convicted on a plea of guilty, on March 9, 1956, in the California Superior Court in and for the County of Los Angeles (R. 42, 43–44). On April 20, 1959, following a hearing before a special inquiry officer (R. 30–41), at which respondent, through counsel, admitted the truth of the factual allegations charged in the order to show cause and conceded deportability (R. 34–35, 42), he was ordered deported (R. 40, 46–47). He took no appeal. That order, however, is concededly invalid (see *infra*, pp. 5–6, 9, incl. n. 2) and is no longer involved.

2. On July 22, 1959, on motion of the Service's prosecuting officer (R. 47–49), the proceedings were ordered reopened by the special inquiry officer (R. 50),[2] and on August 5 the charge presently before the Court—deportability by reason of excludability at entry as an alien "afflicted with psychopathic per-

[2] The motion noted that respondent's conviction of March 9, 1956, on which the outstanding deportation order was based, was for "a misdemeanor classifiable as a petty offense" as defined in Section 4 of the Act of September 3, 1954, 68 Stat. 1145, and hence, under that section, was not in itself a ground for exclusion (R. 48–49). (Section 4 of the 1954 Act, which has been incorporated in Section 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9), provides that an alien who is excludable because of conviction of "a misdemeanor classifiable as a petty offense under [18 U.S.C. 1(3)] by reason of the punishment actually imposed" may be admitted to the United States if he has committed not more than one such offense and if he is otherwise admissible. The punishment "actually imposed" on respondent for his March 9, 1956 conviction—a $200 fine (R. 44, 48, 49)—brought the offense within the 18 U.S.C. 1(3) definition of a petty offense.)

sonality"—was lodged as an additional charge (R. 51–52, 54, 70–71). In support of the latter charge, it was alleged that respondent had been examined by a medical officer of the United States Public Health Service at Los Angeles, California, on June 18, 1959, and had been certified by that Service as being afflicted with "Class A Psychopathic Personality"; that, according to the certification, this condition existed prior to and at the time of his August 1956 entry; that he had been afflicted with the desire for sexual relations with members of his own sex for the preceding 22 years; and that during those years he had indulged in such relations at periodic intervals, averaging about once a month (R. 71).

The evidence received at the reopened hearing, held on August 5 and 26, 1959 (R. 50–79), may be summarized as follows:

Respondent, through his counsel, acknowledged that he had been certified by the Public Health Service as having been afflicted with psychopathic personality both prior to and at the time of his August 1956 entry (R. 53–54, 71), and the Service's certificate, signed by Dr. Arthur Dahlgren, Senior Surgeon, was admitted in evidence (R. 54, 72–73). The record of a second conviction involving respondent, which, respondent admitted, was for the commission of another homosexual act (R. 37–38, 54–55, 74), was received (R. 55–56, 76–78). This was a conviction in the Los Angeles Municipal Court, on August 27, 1953, for having been, willfully and unlawfully, a lewd and dissolute person, in violation of Section 647(5) of the California Penal Code (R. 76–78).

In a sworn statement made by respondent before an investigator of the Immigration and Naturalization Service on March 25, 1959, which was received in evidence at the reopened hearing (R. 54–55, 74–75) and there acknowledged to be true (R. 55), respondent stated that he had had the urge to commit homosexual acts since he was about 24 years old; that he had indulged in such acts with other men in the intervening 22 years whenever the opportunity presented itself, which was usually about once a month or slightly less frequently; that these activities started while he was living in Switzerland and continued after he came to the United States; that his two convictions in Los Angeles, in 1953 and 1956 (see *supra*, pp. 4–5, 6), were based on homosexual acts; and that on a third occasion he had been arrested, in Oxnard, California, for similar activities,[3] but that the latter arrest was based "only on suspicion" and resulted in dismissal of the charges (R. 74–75). Ever since his second Los Angeles arrest, in 1956, he further stated, he had been "very careful" with respect to his homosexual activities because he had heard that such things were "reported to Washington" and he had felt that the immigration authorities might be "looking for" him (R. 75).

On respondent's behalf, there was received in evidence a report concerning respondent's psychiatric history and condition by his personal psychiatrist, Dr. David Harvey, in the form of a letter, dated August

[3] The Oxnard arrest apparently occurred on November 5, 1958 (see R. 38, 49).

10, 1959, to respondent's counsel (R. 6–8, 79). The report was based on the physician's examination of respondent on four occasions in May, June, July and August, 1959 (R. 6). The report acknowledged that respondent had had homosexual experiences since the age of 26, but stated that his "sexual drive—particularly at his age—is thought to be within his range of control, especially if he is under the supervision of continuing contact with a psychiatrist" (R. 7). His "socio-economic relationships" were said to have been "consistently good", and it was stated that he "does not frequent homosexual hang-outs, has no evident interest in youths, manifests no irresponsible trends, and has his main social contacts with respected members of the community" (*ibid.*). The report concluded that respondent's "deviation" was "not sufficient to justify the diagnosis of psychopathic personality"; that the "formal label would be that of: Sexual deviation, homosexuality, now under control" (R. 8).

Dr. Dahlgren, the Public Health Service surgeon who had signed the Service's certificate attesting to respondent's affliction with psychopathic personality (*supra*, p. 6), appeared in person and was cross-examined by respondent's counsel (R. 58–68). He testified that on the basis of his examination of respondent and a review of his history he had concluded that respondent was a sexual deviate, and that he had classified him as a psychopathic personality because the "Manual for Medical Examination of Aliens", the Public Health Service's official instruction book gov-

erning the examination of aliens, requires that sexual deviates be placed in this category (R. 60–64, 67). On cross-examination, Dr. Dahlgren stated that he had "no strong feeling" as to whether, under traditional medical usage, respondent would or would not be considered a psychopathic personality (R. 66). Since respondent was beyond question a sexual deviate, he said, and since the Public Health Service instructions require that such persons be classified as psychopathic personalities, he had no choice but to place respondent in this category (R. 67).

3. In an opinion dated September 22, 1959 (R. 79–86), the special inquiry officer, while concluding that the deportation charge contained in the original order to show cause (excludability at entry by reason of the prior commission of a crime involving moral turpitude) was not sustainable (R. 80–82), held that respondent was nevertheless deportable on the additional charge, *i.e.*, that at the time of his August 1956 entry he was excludable under Section 212(a)(4) of the Act as an alien afflicted with psychopathic personality because, on the undisputed evidence, respondent was, and at entry had been, a homosexual (R. 82–84). Deportation was accordingly ordered on the latter charge (R. 86). An appeal by respondent to the Board of Immigration Appeals was dismissed, with opinion, on November 20, 1959 (R. 86–90).

B. THE REVIEW PROCEEDINGS

1. On December 9, 1959, respondent commenced the present action against the Immigration and Naturalization Service's Los Angeles District Direc-

tor in the United States District Court for the Southern District of California, seeking declaratory and injunctive relief (R. 3–10). The complaint charged that the deportation order was invalid because it was not based on "reasonable, substantial and probative evidence" (R. 5). In opposing the government's motion for summary judgment, respondent advanced the additional contention that the term "psychopathic personality" in Section 212(a)(4) is "so vague and indefinite as to render the statute invalid and unconstitutional" (R. 17, 20–21). The matter was heard by a single district court judge,[4] who, on January 4, 1961, granted the government's motion for summary judgment (R. 19–21). The court, referring to the legislative history of Section 212(a)(4) as set forth in Judge Frank's concurring opinion in *United States* v. *Flores-Rodriguez,* 237 F. 2d 405, 412–413, n. 2 (C.A. 2),[5] observed that it was "clear" from that history that "Congress intended that sexual deviates would be classified by the enforcing agencies as psychopathic personalities" (R. 21; see *infra,* pp. 18–22), and found that there was "certainly * * * ample evidence" to support the administrative finding that respondent was a sexual deviate at the time of his 1956 entry (R. 20). The court rejected the contention based on the alleged vagueness of the term "psychopathic personality", observing that, while it might be true that a criminal statute employing such a term would be

[4] See note 6, *infra*, pp. 12–13.

[5] The legislative history is set forth in detail in the Argument, *infra*, pp. 18–22.

deemed unconstitutionally indefinite, the same strict standard should not be required of a statute defining aliens who are to be excluded from the United States (R. 21).

2. On April 17, 1962, the Court of Appeals for the Ninth Circuit set aside the deportation order and enjoined its enforcement (R. 100, 101), holding the term "psychopathic personality" void for vagueness as applied in this case. The court noted that the principle underlying the void-for-vagueness doctrine is that the exaction of obedience to a rule or standard which is so vague and indefinite as really to be no standard at all is violative of fundamental fairness. The court recognized that respondent's deportation had not been ordered because of any event or act committed by him after his entry in August 1956 but on the ground that, at the time of that entry, he was excludable because of a condition with which he was afflicted. But it observed that the Immigration and Naturalization Service, in making its finding as to the existence of that condition, had relied in part on behavior by respondent postdating both his 1952 and his 1956 entries (R. 95–96). Such reliance, it held, made the application of Section 212(a)(4) to respondent's case unfair since, so far as the record revealed, respondent's continuance of homosexual activities after he entered the country in 1952, and again in 1956, was not compulsive, but a matter of choice (R. 96). "[I]f, by reason of vagueness, the statute failed to advise him that homosexual practices conclusively evidence a 'psychopathic personality'," the court rea-

soned, "Fleuti was substantially prejudiced". For, "[a]s in the case of a vague criminal statute, he would thereby be deprived of notice that unless he refrained from such conduct harsh results might follow" (*ibid.*).

Having concluded, for the foregoing reasons, that this was a proper case for the application of the void-for-vagueness principle, the court went on to hold that the term "psychopathic personality" must be read without regard to its legislative history; that the term, when "measured by common understanding and practices", did "not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein"; and that the deportation order accordingly could not stand (R. 97–100).[6]

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[6] For the reasons noted in its opinion (R. 91–92, n. 1), the court considered the case as though it were before it for initial review of the deportation order (pursuant to Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. (Supp. III) 1105a, and 5 U.S.C. 1031 *et seq.*) rather than as on appeal from the district court judgment. In brief, those reasons were as follows:

Under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. (Supp. III) 1105a, which was added to the Act by Section 5(a) of the Act of September 26, 1961, 75 Stat. 651, it is provided that the procedure prescribed for the review of other federal agency orders (5 U.S.C. 1031 *et seq.*) shall henceforth be the sole and exclusive procedure for the judicial review of deportation orders. Section 5(b) of the 1961 Act provides that any judicial proceeding to review an order of deportation "which is pending unheard" in any district court on the effective date of that section (October 26, 1961)—with exceptions not relevant—shall be transferred for determination to the court of appeals having jurisdiction to entertain a petition for review under that section. The instant case was disposed of by the district court prior to October 26, 1961;

SUMMARY OF ARGUMENT

I

The legislative history of the Immigration and Nationality Act shows that Congress intended to exclude alien homosexuals—a class of which respondent is, and at entry was, an acknowledged member—as persons within the general category "[a]liens afflicted with psychopathic personality." The early bills, which eventuated in the Act, provided for the exclusion of homosexuals and sex perverts in explicit

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therefore, transfer of the case to the court of appeals under the statutory provision referred to was not required at that time. The court of appeals noted, however, *sua sponte*, that, because respondent had sought to restrain the enforcement of a deportation statute on the ground that the statute was unconstitutional as applied to him, the case should have been heard by a district court of three judges, pursuant to 28 U.S.C. 2282, rather than by a single judge, as had been done in this case. But if the court of appeals were then to remand the case to the district court because of the failure to convene a three-judge court, it would become a judicial proceeding "pending unheard" in the district court, with the consequence that it would then be necessary for the district court to transfer the case back to the court of appeals as provided in Section 5(b) of the 1961 Act. To avoid such circuity, the court of appeals decided that it would consider the case as though it had been remanded to the district court and transferred back to the court of appeals, and thus already before the latter court as on initial judicial review pursuant to the recently enacted legislation referred to above.

We agree that this procedural disposition was correct, for the reasons stated by the court. It may be pointed out, moreover, that, in any event, since the issue on the merits involves a pure question of law, it makes no practical difference whether the case be deemed to have been before the court of appeals on direct review of an agency order or on appeal from an intervening district court judgment.

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terms. On the basis of recommendations of the Public Health Service, which advised that homosexuality and sex perversion, where clearly manifested, are considered types of psychopathic personality, the draftsmen of the legislation omitted the specifications contained in earlier drafts, but carefully explained that the "change of nomenclature" was "not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates."

II

The court of appeals erred in applying the void-for-vagueness principle to the deportation proceedings in this case. It held that evidence of respondent's acts in the United States could be considered by the Immigration and Naturalization Service as bearing upon his condition at the time of entry only if he was properly warned by the statutory terms themselves that such evidence would be relevant to determining whether he had properly been admitted and thus whether he could be deported. This holding is erroneous for three separate reasons.

A. The constitutional requirement of fair warning applies only to statutes regulating conduct or imposing sanctions upon conduct; it does not apply to a statute, such as Section 212(a)(4) of the Immigration and Nationality Act, which merely prescribes standards for the admission of aliens. As guides to adjudication, all statutes must, of course, be sufficiently definite to provide judges, juries, and administrative tribunals with adequate standards for enforcing the legislative mandate uniformly and consistently and in

accordance with the legislative intent. Here, the legislative history makes absolutely clear that Congress intended Section 212(a)(4) to apply to homosexuals. Some statutes serve, in addition, to give guidance to individuals in conforming their conduct to established standards of behavior. It is with respect to such statutes that the void-for-vagueness principle had its origin and with which it has been most often concerned. This principle—that a person is entitled to know, before he acts, what conduct the law forbids or requires—has no application to the present case, where the statutory ground for expulsion is not the alien's conduct after entry, but his *condition at the time of entry.*

B. Even if respondent had been ordered deported because of his post-entry conduct and not, as is plainly the case, because of his excludable status at the time of entry, he could not object to any lack of clarity in the deportation statute read on its face. Congress may enact grounds of deportation retroactively, and thereby render an alien deportable for past conduct which did not entail deportability when it occurred. Congress could, therefore, pass a retroactive statute making past homosexual conduct by an alien within the United States grounds for his deportation. This being so, respondent's argument as to lack of notice necessarily fails.

C. Even if the constitutional requirement of fair warning were not wholly inapplicable to a deportation proceeding turning on whether the alien was properly admitted to the United States, this requirement would

plainly be far less stringent in a case such as this than where the statute is required to give notice of criminal sanctions. This Court has considered the prior construction of a State statute by the highest court of the State as fixing the statute's meaning when it was attacked as void for vagueness, and has similarly considered the legislative histories of statutes in rejecting challenges based on that ground. The present case would not involve essentially different considerations, even if our basic contention, that the vagueness principle is wholly inapplicable, were unsound.

ARGUMENT

Respondent has been ordered deported, under Section 241(a)(1) of the Immigration and Nationality Act (*supra*, pp. 2–3), as an alien who, at the time of entry, was within a class of aliens who were excludable by the law existing at the time of such entry. The "entry" involved is respondent's reentry in August 1956 (see *supra*, p. 4), and the basis of excludability is one of the grounds specified by Section 212(a)(4) of the Act (*supra*, p. 2), *viz.*, "[a]liens afflicted with psychopathic personality".

It should be noted, preliminarily, that the fact that the entry in question was a reentry, as distinguished from an original entry,[7] is immaterial. "Entry" is a term of art in immigration law and includes "any com-

[7] Respondent's original entry occurred on October 9, 1952 (R. 14). The evidence introduced at the deportation hearing indicated that the psychophysical condition on which the deportation order was predicated, homosexuality, existed at the time of the original entry as well as at the time of the August 1956 reentry—and in fact had been present for at least 16 years pre-

ing of an alien from a foreign country into the United States whether such coming be the first or any subsequent one". *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425. This concept has been substantially adopted in the 1952 Act's definition of "entry" as meaning (§ 101(a)(13), 66 Stat. 167, 8 U.S.C. 1101 (a)(13)):

> any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by the deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

Thus, unless Congress has otherwise provided, an alien seeking reentry must meet all conditions of admission specified by Congress for initial entrants. If he falls within any of the inadmissible classes, his deportation is required by Section 241(a)(1). Apart from alienage, which is not questioned here, the sole issue pre-

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viously (see *supra*, pp. 6–9). However, the original entry, while it occurred after the enactment of the Immigration and Nationality Act (June 27, 1952), took place prior to its effective date (December 24, 1952) (§ 407, 66 Stat. 281).

sented in such a situation is whether the alien was excludable by then existing law.

I

RESPONDENT IS AN ACKNOWLEDGED MEMBER OF A CLASS OF ALIENS (HOMOSEXUALS AND OTHER SEXUAL DEVIATES) WHOM CONGRESS INTENDED TO EXCLUDE FROM THIS COUNTRY BY SECTION 212 (a)(4) OF THE IMMIGRATION AND NATIONALITY ACT, AS SHOWN BY THE LEGISLATIVE HISTORY OF THAT SECTION

That Congress intended the term "[a]liens afflicted with psychopathic personality," as used in Section 212 (a)(4) of the 1952 Immigration and Nationality Act, to include homosexuals and other types of sexual deviates is conclusively demonstrated by the legislative history of the section.[8]

The term first appeared in the immigration laws in the 1952 Act. Under prior law, the corresponding

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[8] The pertinent history here reviewed is also cited in Judge Frank's concurring opinion in *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 412–413, n. 2 (C.A. 2) (to which reference was made by the district court in this case (R. 21)), as well as in *Matter of P——*, 7 I & N Dec. 258, 261–264 (1956). In view of the unambiguous legislative history, the courts which have considered the question have had no difficulty in concluding that aliens "afflicted with psychopathic personality", as the term is used in Section 212(a)(4), includes aliens who are homosexuals. See *Quiroz* v. *Neelly*, 291 F. 2d 906 (C.A. 5); *United States* v. *Flores-Rodriguez*, 237 F. 2d 405, 412–416 (C.A. 2) (concurring opinion); *Ganduxe y Marino* v. *Murff*, 183 F. Supp. 565 (S.D. N.Y.), affirmed *sub nom. Ganduxe y Marino* v. *Esperdy*, 278 F. 2d 330 (C.A. 2), certiorari denied, 364 U.S. 824.

term, describing a class of aliens excludable because of a psychopathic disorder, had been "persons of constitutional psychopathic inferiority" (Act of February 5, 1917, § 3, 39 Stat. 875, as amended, 8 U.S.C. (1946 ed.) 136(a)). In addition, persons who were found to be, and certified as, "mentally * * * defective" were excludable under then existing law (*id.*, 8 U.S.C. (1946 ed.) 136(d)). In 1950, a subcommittee of the Senate Committee on the Judiciary, in a comprehensive study of the immigration laws, reported:

> The present clauses excluding mentally and physically defective aliens, with three exceptions, are sufficiently broad to provide adequate protection to the population of the United States, without being unduly harsh or restrictive. The subcommittee believes, however, that the purpose of the provision against "persons with constitutional psychopathic inferiority" will be more adequately served by changing that term to "persons afflicted with psychopathic personality", and that the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts. * * * [S. Rep. 1515, 81st Cong., 2d sess., *The Immigration and Naturalizations Systems of the United States*, Report of the Committee on the Judiciary Pursuant to S. Res. 137, 80th Cong., 1st sess., as amended (*A Resolution to Make an Investigation of the Immigration System*), April 20, 1950, p. 345.]

As a result of this study, S. 3455, 81st Cong., 2d sess., was introduced in the Senate on April 20, 1950. Section 212(a) of the bill provided in pertinent part:

> SEC. 212. (a) The following classes of aliens shall be excluded from admission into the United States:
>
> (1) Aliens who are idiots, imbeciles, feeble-minded, epileptics, or insane;
>
> * * * * * *
>
> (3) Aliens afflicted with psychopathic personality;
>
> * * * * * *
>
> (7) Aliens who are homosexuals or sex perverts;
>
> (8) Aliens not comprehended within any of the foregoing classes who are certified by the examining surgeon as having a mental defect * * *.

S. 716, 82d Cong., 1st sess., a revised version of S. 3455, introduced on January 29, 1951, was identical with the earlier bill in relevant part. However, when S. 2550, 82d Cong., 2d sess., a further modification of the predecessor bills, was introduced on January 29, 1952, the above-quoted subsection had been dropped and Section 212(a), phrased as it was later enacted into law, provided, in pertinent part, as follows:

> SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> (1) Aliens who are feeble-minded;
>
> (2) Aliens who are insane;
>
> * * * * * *

> (4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect;
>
> * * * * *

In explanation of the omission of the category "[a]liens who are homosexuals or sex perverts", which had appeared in the predecessor bills, the committee report accompanying S. 2550 stated (S. Rep. 1137, 82d Cong., 2d sess., p. 9):

> Existing law does not specifically provide for the exclusion of homosexuals and sex perverts. The provisions of S. 716 which specifically excluded homosexuals and sex perverts as a separate excludable class does not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. *This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.* [Emphasis added.]

The advice of the Public Health Service mentioned in this Report appears in H. Rep. 1365, 82d Cong., 2d sess., accompanying H.R. 5678 (the bill which was eventually enacted). The Service was commenting on the "medical aspects" of H.R. 2379, 82d Cong., 1st sess., a predecessor bill and companion to S. 716. Like S. 716, H.R. 2379 included, as separate excludable categories, "[a]liens afflicted with psychopathic personality," "[a]liens who are homosexuals or sex perverts," and aliens not within either of those classes (or other

class specified in the bill) who were certified by the examining physician as having "a mental defect." The Public Health Service recommended that "[a]liens who are homosexuals or sex perverts" be eliminated as a separate category, and that the language of the bill be changed to read, in pertinent part, "[a]liens afflicted with psychopathic personality * * * or a mental defect"—the phraseology ultimately enacted (H. Rep. 1365, 82d Cong., 2d sess., p. 46). The Service indicated in an accompanying explanatory comment its belief that the suggested language would encompass the objective of the bill as reflected in the three separate categories referred to above, and its understanding that homosexuality and sex perversion, where clearly manifested, are ordinarily to be considered as types of psychopathic personality (*id.*, p. 47).[9] The House Judiciary Committee, in reporting out H. R. 5678 (in the form in which it was enacted into law, so far as is relevant), indicated that it had followed the Public Health Service's recommendations (*id.*, p. 48).

It thus conclusively appears from the legislative history of the 1952 Act that Congress intended the phrase "[a]liens afflicted with psychopathic personality" in Section 212(a)(4) to include within its scope homosexuals and other sexual deviates. And since respondent, as we have seen, is admittedly a sexual deviate and homosexual, and was such at entry, it follows that he is a member of a class of aliens whom Congress decided to exclude.

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[9] The relevant portions of the Public Health Service's report are set forth in the Appendix, *infra*, pp. 38–40.

II

THE COURT OF APPEALS ERRED IN APPLYING THE VOID-FOR-VAGUENESS PRINCIPLE TO THE DEPORTATION PROCEEDINGS IN THIS CASE

The court of appeals did not question the conclusion that Congress, in enacting Section 212(a)(4), proposed to exclude sexual deviates. The court held, however, that in making its finding that respondent was, at the time of entry, a member of an excludable class (homosexuals), the Immigration and Naturalization Service had relied in part upon evidence that could not constitutionally be considered. Evidence of Fleuti's acts in the United States could, the court held, be considered as bearing upon his condition at the time of entry only if Fleuti was properly warned, by the face of the statute, that such evidence would be relevant to determining whether he had properly been admitted and thus whether he could be deported.

One complete answer to the court's holding is that, while the administrative finding as to respondent's excludable status in 1956 was supported in part by evidence of his conduct in this country since his initial entry in 1952, the result would necessarily have been the same had no such post-entry evidence been introduced. Respondent himself had admitted that he was a homosexual at the time of entry and had regularly engaged in homosexual conduct for many years prior to his initial entry. This evidence alone would have required his deportation without regard to any post-entry conduct. But even apart from this evidentiary consideration, the Ninth Circuit's holding, we submit,

is legally untenable. This is so for three separate reasons.

A. THE CONSTITUTIONAL REQUIREMENT OF FAIR WARNING APPLIES TO STATUTES REGULATING CONDUCT OR IMPOSING SANCTIONS UPON CONDUCT, BUT DOES NOT APPLY TO A STATUTE, SUCH AS SECTION 212(a)(4), WHICH MERELY PRESCRIBES STANDARDS FOR THE ADMISSION OF ALIENS

The requirement that a statute be clear and definite is based upon two fundamental considerations: (1) Statutes guide courts and administrative tribunals in the adjudication of various rights, duties and liabilities; (2) they may also serve as guides to the individuals subject to them in planning their future conduct.[10]

1. As guides to adjudication, statutes must be sufficiently definite to provide judges, juries, and administrative tribunals with adequate standards for enforcing the legislative mandate uniformly and consistently in accordance with the legislative intent. *United States* v. *Petrillo*, 332 U.S. 1, 7; *Minnesota* v. *Probate Court*, 303 U.S. 270; *Mahler* v. *Eby*, 264 U.S. 32, 40–41. A deportation statute, like any other, can be challenged on the ground that it provides neither the administrative authorities nor the courts with any reliable basis for determining what classes of aliens are deportable and thus improperly leaves the selection of deportable aliens to the caprice of administrative officials. But such a challenge cannot be made in reliance on the face of the statute alone. It is the courts' function to con-

[10] For a discussion of these considerations, see Note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77 (1948); cf. *United States* v. *Petrillo*, 332 U.S. 1, 7; *Musser* v. *Utah*, 333 U.S. 95, 97.

strue the statute to ascertain what the legislature intended by the words it used; and, in determining the legislative intent, the courts may consider any relevant evidence, including the legislative history of the provision in question. Thus, the courts, in construing the coverage of the federal laws relating to exclusion and deportation, have frequently consulted the legislative history, historical background and similar materials for the purpose of ascertaining more precisely the types of persons Congress intended to encompass within a specified excludable or deportable class. See, *e.g., Rowoldt* v. *Perfetto*, 355 U.S. 115, 120; *Galvan* v. *Press*, 347 U.S. 522, 526–528; *Knauff* v. *Shaughnessy*, 338 U.S. 537, 545–547; *Holy Trinity Church* v. *United States*, 143 U.S. 457, 462–465.

Here, as we have shown, the legislative history of the statutory provision in question shows beyond a doubt that Congress intended to exclude persons afflicted with the particular psychophysiological disorder with which respondent is affected, the urge to have homosexual relations. The primary function of the requirement of definiteness—the facilitation of adjudication—is thus fulfilled in this case. For this reason, the court of appeals (R. 98–100) erred in thinking it material that there are differences of opinion among psychiatrists as to the precise meaning and scope of the term "psychopathic personality." As the Court of Appeals for the Fifth Circuit, in *Quiroz* v. *Neelly*, 291 F. 2d 906, 907, remarked in sustaining the deportation of a homosexual alien under the same provisions as those involved here—

> Whatever the phrase "psychopathic personality" may mean to the psychiatrist, to the Congress it was intended to include hom sexuals and sex perverts. It is that intent which controls here.

It is not necessary for purposes of this case to delineate the full scope of the phrase "afflicted with psychopathic personality" as used in Section 212(a)(4). It is enough that the legislative history establishes that Congress intended it to cover persons with the particular disorder (homosexuality) with which respondent is afflicted. That there may be doubt as to the applicability of the term to persons with other types of psychophysical defects or disorders is not a reason for failing to apply it here. If there be doubt as to whether the term embraces persons with different psychic traits or disorders, "it will be time enough," as this Court observed (considering another statute) in *United States* v. *Wurzbach*, 280 U.S. 396, 399, "to consider [the matter] when raised by someone whom it concerns." See also, *e.g.*, *United States* v. *Petrillo*, 332 U.S. 1, 7, 9–12; *Williams* v. *United States*, 341 U.S. 97, 101; *Jordan* v. *De George*, 341 U.S. 223, 232; *Dennis* v. *United States*, 341 U.S. 494, 516.

2. Although all statutes must guide adjudication, some must serve, in addition, to give guidance to individuals with respect to their future conduct. Many statutes, for example, require the performance or avoidance of specified acts. Elementary fairness requires that such acts be described in the statute with

sufficient precision to give the individual adequate notice of what conduct he must either perform or avoid. It is with respect to this function of statutes that the void-for-vagueness principle had its origin and with which it has been most often concerned. This is made clear by this Court's statement of the principle in *United States* v. *Harriss*, 347 U.S. 612, 617:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

Similarly, in *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, the Court declared:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

In a multitude of other decisions this Court has similarly stressed that the "constitutional requirement of definiteness" in a statute (*United States* v. *Harriss*,

supra, at 617) flows from the fact that it is the function of the statute to serve as a guide for conduct."[11] Although the principle is primarily associated with cases involving criminal statutes, it has also been applied to statutes imposing civil sanctions.[12] See, *e.g.*, *Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 239; *Miller* v. *Strahl*, 239 U.S. 426, 434; but cf. *Levy Leasing Co.* v. *Siegel*, 258 U.S. 242, 249–250. There, again, the Court has stressed that the invalidity of the statute challenged was a consequence of the fact that, though the enactment purported to estab-

[11] *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U.S. 86, 108–111; *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, 221–223; *Collins* v. *Kentucky*, 234 U.S. 634, 637–638; *Fox* v. *Washington*, 236 U.S. 273, 277; *Miller* v. *Strahl*, 239 U.S. 426, 434; *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348; *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89–93; *Weeds, Inc.* v. *United States*, 255 U.S. 109, 110–111; *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 501–503; *Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 238–242; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 457–465; *United States* v. *Wurzbach*, 280 U.S. 396, 399; *Smith* v. *Cahoon*, 283 U.S. 553, 564; *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U.S. 210, 241–243; *Herndon* v. *Lowry*, 301 U.S. 242, 261–264; *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453–458; *United States* v. *Ragen*, 314 U.S. 513, 523–524; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573–574; *Screws* v. *United States*, 325 U.S. 91, 101–104; *United States* v. *Petrillo*, 332 U.S. 1, 5–8; *Musser* v. *Utah*, 333 U.S. 95, 96–97; *Winters* v. *New York*, 333 U.S. 507, 515–520; *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340; *United States* v. *Spector*, 343 U.S. 169, 171–172; *United States* v. *Cardiff*, 344 U.S. 174, 176–177; *United States* v. *Kahriger*, 345 U.S. 22, 33–34; *Roth* v. *United States*, 354 U.S. 476, 491–492.

[12] A higher standard of certainty, however, is required in the case of a criminal statute. *Winters* v. *New York*, 333 U.S. 507, 515; cf. *Mahler* v. *Eby*, 264 U.S. 32, 41.

lish a rule of conduct, it was too vague to give adequate guidance. Thus, in *Small Co.* v. *American Sugar Refining Co., supra,* the Court stated (267 U.S. at 239):

> The defendant attempts to distinguish those cases [prior decisions of the Court holding criminal statutes invalid on grounds of vagueness] because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. * * *

The rule that a person is entitled to know, before he acts, just what conduct the law forbids or requires has no application, however, to the present case. Here the statutory ground for expulsion is not the alien's conduct after entry, but his *condition at the time of entry.* Congress has plenary authority to make rules and regulations for the admission of aliens and to establish categories of aliens who shall be excluded or deported, either absolutely or on such conditions as it may prescribe. *The Chinese Exclusion Case,* 130 U.S. 581; *Fong Yue Ting* v. *United States,* 149 U.S. 698; *Knauff* v. *Shaughnessy,* 338 U.S. 537; *Carlson* v. *Landon,* 342 U.S. 524; *Harisiades* v. *Shaughnessy,* 342 U.S. 580. This authority includes without question the power to exclude aliens applying for admission whom Congress deems undesirable because of some mental or physical condition and to direct their deportation if their inad-

missibility is discovered only after entry has been effected.[13] Section 212(a) (8 U.S.C. 1182(a)) is in large measure a catalog of such disqualifying conditions.[14] These provisions of the statute are in no sense guides to conduct, and the application to them of the principle requiring definiteness in behavior-governing statutes can have no rational justification.

It is the duty of the administrative authorities inquiring into an alien's admissibility to determine whether he is afflicted with any of the named conditions; and if they have any doubt as to the meaning of any of the statutory terms employed, there is no reason why they should not look to any available source, including the legislative history of a particular provision, to ascertain more precisely the legislative intent. If the issue arises, as here, in a deportation proceeding (based on excludability at time of entry), as distinguished from an exclusion proceeding, the inquiry is the same: Is the alien within a class which Congress has directed to be excluded? The deporta-

[13] Even those critics who have questioned the power of Congress to deport aliens for post-entry activities do not doubt that aliens inadmissible at the time of entry may later be properly expelled. See, *e.g.*, Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*, 68 Yale L. Journ. 1578, 1580, 69 Yale L. Journ. 262 (1959); cf. Boudin, *The Settler Within Our Gates*, 26 N.Y.U.L. Rev. 266, 26 N.Y.U.L. Rev. 451, 466–467, 26 N.Y.U.L. Rev. 634, 656–657 (1951).

[14] In addition to aliens afflicted with psychopathic personality, Section 212(a) requires the exclusion, for example, of "feebleminded" persons, the "insane," those who have had "one or more attacks of insanity," those suffering from "epilepsy" or a "mental defect," "narcotic drug addicts," "chronic alcoholics," those "afflicted with tuberculosis in any form," those suffering from "leprosy, or any dangerous contagious disease," etc.

tion provision of Section 241(a)(1), here geared to inadmissibility under Section 212(a)(4), requires the determination of only one question: What was the alien's condition at the time of entry? If it is found, by the requisite evidence, that the alien was then afflicted with psychopathic personality, in the sense that Congress used the term, deportability is established.

The decision below sought to avoid the conclusion that Sections 212(a)(4) and 241 (a)(1), since they do not purport to govern behavior, need not provide clear warning to aliens excluded or deported by pointing out that, "[w]hile the post-entry conduct [of respondent] was not itself the ground of deportation," such conduct "was used as evidence of a pre-entry deportable condition"—with the consequence, it is said, that respondent was prejudiced by the vagueness of the term "psychopathic personality" in the challenged provision (R. 96–97). The court reasoned that since, "[i]nsofar as the record reveals, continuance of homosexual practices after Fleuti entered this country in 1952, and again in 1956, was not compulsive, but was a matter of choice," he might not have engaged in such practices in this country had he been adequately warned by the statute that "harsh results," *i.e.*, deportation, might follow if he did not refrain from such conduct (R. 96). See, also, the Statement, *supra*, pp. 11–12.

The court below, of course, recognized that respondent's post-entry conduct was not the basis for his deportation, but was only evidence of his condition

at the time of entry. What it has done is to extend—in a way which we believe unprecedented—the doctrine of unconstitutional vagueness. It has fashioned it into a rule which protects the alien from inadvertently furnishing evidence bearing upon his condition at the time of entry. Under the court of appeals' holding, it would be unconstitutional for the administrative authorities to consider any evidence that might not have been available had respondent known of the deportability of aliens who were homosexuals at the time of entry. Thus, such post-entry evidence as a letter describing the alien's pre-entry conduct, or evidence of treatment voluntarily undertaken, or statements made to employers or other parties would have to be excluded for precisely the same reasons that the court considered evidence of homosexual acts inadmissible.

Not only does no precedent exist for such an extension of the void-for-vagueness rationale, but the decision cannot be justified in principle. The void-for-vagueness doctrine is a canon of fairness designed to ensure that no person shall incur a sanction, civil or criminal, for failure to conform his conduct to a statutory rule of action seeking to regulate his future behavior, unless the command of the statute is sufficiently clear that persons of normal intelligence will know what conduct is forbidden and what allowed. It is *not* a device to enable persons having defined characteristics, physical or psychic, or suffering from specified physical or mental diseases or defects, to conduct themselves so as to avoid making these conditions manifest.

B. THERE IS NO CONSTITUTIONAL REQUIREMENT THAT CONGRESS, WHICH MAY ENACT GROUNDS OF DEPORTATION RETROACTIVELY, MUST MAKE THE GROUNDS OF DEPORTATION CLEAR ON THEIR FACE

Even if respondent had been ordered deported because of his post-entry conduct and not, as is plainly the case, because of his excludable status at the time of entry, he could not object to the lack of clarity of the deportation statute read on its face. An alien whom the government seeks to deport is of course entitled, as a matter of procedural due process, to notice of the charges he must face at the deportation hearing. But it does not follow that, before he can become liable to deportation, Congress must first warn him of the classes which are deportable so that he may guide himself accordingly. Congress, as this Court has repeatedly held, may enact grounds of deportation retroactively, and thereby render an alien deportable for past conduct which did not entail deportability when it occurred. *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Galvan* v. *Press*, 347 U.S. 522; *Marcello* v. *Bonds*, 349 U.S. 302; *Lehmann* v. *Carson*, 353 U.S. 685; *Mulcahey* v. *Catalanotte*, 353 U.S. 692. See, also, *Bugajewitz* v. *Adams*, 228 U.S. 585, 591; *Ng Fung Ho* v. *White*, 259 U.S. 276, 280; *Mahler* v. *Eby*, 264 U.S. 32, 37, 39; *Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, 529.

Under these decisions it is, we believe, settled that Congress could pass a statute retroactively making any homosexual conduct within the United States grounds for deportation of the alien. This being so, there can be no doubt that Congress could constitutionally make future homosexual conduct grounds for

deportation whether or not it expressed its intention in a way that was not only clear to the administrative authorities and the courts, but also plain to resident aliens without recourse to the legislative history of the statute.

We recognize that in *Jordan* v. *De George*, 341 U.S. 223, 231–232, this Court in fact examined, on grounds of inadequate warning, a statute making deportability turn on post-entry conduct. That decision, however, preceded the recent decisions reaffirming the power of Congress to enact grounds of deportation retroactively, and the implications of that power with respect to the issue before the Court were not considered; the question of fair warning was not discussed in the briefs of the parties and the Court's consideration of the question appears to have been elicited by a dissent which was primarily based, not on the fact that the somewhat vague deportation provision provided inadequate warning, but on the lack of sufficiently clear standards to be applied by the administrative officials and courts;[15] and the meaning of the statutory provision could in no way be clarified by recourse to the legislative history.

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[15] In *Mahler* v. *Eby*, 264 U.S. 32, a statute which authorized the Secretary of Labor to deport aliens (of designated classes) whom he found, after hearing, to be "undesirable residents of the United States" (Act of May 10, 1920, § 1, 41 Stat. 593) was sustained as against a charge that it was unconstitutionally vague. The challenge to the statute was based, however, not on the ground that it provided no ascertainable standard of conduct for aliens to follow if they wished to avoid deportation, but on the ground that, by reason of the vagueness of the criterion of deportability, it amounted to an invalid delegation of legislative power to an executive officer (264 U.S. at 40).

In sum, the decisions of this Court establish that Congress could retroactively make homosexual conduct within the United States grounds for revocation of the statutory permission to remain and for deportation. It can therefore make such conduct grounds for deportation in a statute to be applied prospectively, whether or not the statute is clear on its face. *A fortiori*, Congress can constitutionally make evidence of homosexual conduct in the United States relevant to a determination of whether the alien was admissible to the country at the time of entry, whether or not the alien is advised of this relevance by the face of the statute.

C. SECTION 212(a)(9)(C)(i), INTERPRETED IN LIGHT OF ITS LEGISLATIVE HISTORY, PROVIDES ADEQUATE NOTICE THAT AN ALIEN WHO IS A HOMOSEXUAL IS NOT ADMISSIBLE TO THE UNITED STATES AND MAY BE DEPORTED IF ERRONEOUSLY ADMITTED

Finally, even if the constitutional requirement of fair warning were not wholly inapplicable to a deportation proceeding turning on whether the alien was properly admitted to the United States, this requirement would plainly be far less stringent in a case such as this than where the statute is required to give notice of criminal sanctions. Cf. *Winters v. New York*, 333 U.S. 507, 515. Thus the type of notice constitutionally required prior to deportation of an alien such as respondent would have to be determined in light of the following: respondent is being deported because he was improperly admitted, and not on the basis of his conduct in the United States; he was entitled to no warning of the requisite standards for admission; Congress may retroactively, and thus entirely without

warning, make even post-entry conduct grounds for revocation of its permission for the alien to remain in the United States. In this light and in view of this Court's prior decisions in cases where the claim of unfairness resulting from absence of warning was far less attenuated, we submit that there can be no constitutional requirement that Section 212(a)(4) be plain on its face without recourse to its legislative history.

This Court has considered the prior construction of a State statute by the highest court of the State as fixing the statute's meaning when it was attacked as void for vagueness. See, *e.g.*, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572–574.[16] Similarly, a statute's legislative history can be used to lend certainty to an otherwise insufficiently definite statute. See, *e.g.*, *United States* v. *Harriss*, 347 U.S. 612, 620–623, where the legislative history of the Federal Reg-

[16] Indeed, the Court has even considered the construction placed on the statute by the State's courts in the proceedings on review of the accused's conviction—*after* he has acted. In such decisions as *Fox* v. *Washington*, 236 U.S. 273, 277, *Cox* v. *New Hampshire*, 312 U.S. 569, 575–576, *Winters* v. *New York*, 333 U.S. 507, 512–5[illegible] *Kovacs* v. *Cooper*, 336 U.S. 77, 84–85, and *Cole* v. *Arkansas*, 338 U.S. 345, 348–349, 354, the Court, in applying the test of definiteness to state criminal statutes, has treated the statute in each instance as though it's text bore the interpretive gloss placed on it by the highest court of the State in the very proceeding in which the litigant before the bar had appealed from his conviction—in other words, after the commission of the act for which he had been brought to trial. See, *e.g.*, *Winters* v. *New York*, *supra*, 333 U.S. at 514–515: "We assume that the defendant, at the time he acted, was chargeable with knowledge of the scope of subsequent interpretation."

ulation of Lobbying Act was cited by the Court in rejecting a challenge to the constitutionality of the Act on grounds of indefiniteness; and *Screws* v. *United States*, 325 U.S. 91, 98–104, where the legislative history of Section 20 of the Criminal Code was considered in construing the section narrowly enough to obviate a charge of unconstitutional vagueness. There can therefore be no doubt that respondent, whose right to statutory notice is, at best, far less clear, could fairly be required to have recourse to the legislative history of Section 212(a)(4), which states with unusual clarity that homosexuals are excluded from admission to the United States.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed and the order of deportation reinstated.

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APPENDIX

Report of the Public Health Service on the medical aspects of H.R. 2379, a bill to revise the laws relating to immigration, naturalization, and nationality, and for other purposes (H. Rep. 1365, 82d Cong., 2d sess., pp. 46–48):

It is recommended that the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

1. Aliens who are idiots, imbeciles, or morons.
2. Aliens who are insane.
3. Aliens who have had one or more attacks of insanity.
4. Aliens afflicted with psychopathic personality, epilepsy, or a mental defect.
5. Aliens who are narcotic drug addicts or chronic alcoholics.
6. Aliens who are afflicted with tuberculosis in any form, or with leprosy or any other dangerous contagious disease.
7. Aliens certified by the examining surgeon as having a physical defect, disease, or disability, when determined by the consular or immigration officer to be of such a nature that it may affect the ability of the alien to earn a living.

The following comments are submitted:

* * * * *

Psychopathic personality.—Some comments should be expressed regarding the term "psychopathic personality." Although the term "pyschopathic personality," used in classifying certain types of mental disorders, is vague and indefinite, no more appropriate expression can be suggested at this time. The conditions clas-

sified within the group of psychopathic personalities are, in effect, disorders of the personality. They are characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior, rather than by mental or emotional symptoms. Individuals with such a disorder may manifest a disturbance of intrinsic personality patterns, exaggerated personality trends, or are persons ill primarily in terms of society and the prevailing culture. The latter or sociopathic reactions are frequently symptomatic of a severe underlying neurosis or psychosis and frequently include those groups of individuals suffering from addiction or sexual deviation. Until a more definitive expression can be devised, the term "psychopathic personality" should be retained.

Epilepsy.—* * *

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Sexual perverts.—The language of the bill lists sexual perverts or homosexual persons as among those aliens to be excluded from admission to the United States. In some instances considerable difficulty may be encountered in substantiating a diagnosis of homosexuality or sexual perversion. In other instances where the action and behavior of the person is more obvious, as might be noted in the manner of dress (so-called transvestism or fetishism), the condition may be more easily substantiated. Ordinarily, a history of homosexuality must be obtained from the individual, which he may successfully cover up. Some psychological tests may be helpful in uncovering homosexuality of which the individual, himself, may be unaware. At the present time there are no reliable laboratory tests which would be helpful in making a diagnosis. The detection of persons with more obvious sexual perversion is relatively simple. Considerably more difficulty may be encountered

in uncovering the homosexual person. Ordinarily, persons suffering from disturbances in sexuality are included within the classification of "psychopathic personality with pathologic sexuality." This classification will specify such types of pathologic behavior as homosexuality or sexual perversion which includes sexual sadism, fetishism, transvestism, pedophilia, etc. In those instances where the disturbance in sexuality may be difficult to uncover, a more obvious disturbance in personality may be encountered which would warrant a classification of psychopathic personality or mental defect.

Mental defect.—The utilization of the term "mental defect" serves a very useful purpose and should be continued within the language of the bill. It should be pointed out that in using this expression, "mental defect," it has or bears no relationship to mental deficiency which is related to the intellectual status of the individual. The term "mental defect," although broad and sweeping, is a safeguard for classifying those aliens who would not fit into the categories listed above. For example, there is a fairly large group of hereditary disturbances which at the time of examination could not be included in the above classification. This expression could also be utilized in classifying progressive personality disorders which occur in such conditions as infections of the nervous system; for example, in behavior disorders of epidemic encephalitis. Such a term could also be used to cover the more severely disabling neuroses and conduct and habit disorders of adults and children. It can be used in classifying those persons who are likely to be brought into repeated conflict with social customs, authority, or society in general. It is, therefore, recommended that the expression "as having a mental defect" be retained within the language of the bill.

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